Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,
Petitioners,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL R. GONZALEZ, NATHAN L. HECHT, JOHN CORNYN, CRAIG T. ENOCH, ROSE SPECTOR, PRISCILLA R. OWEN, JAMES A. BAKER, AND GREG ABBOTT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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Date: May 5, 1997

35 pp

QUESTIONS PRESENTED

1. Did the court of appeals err in determining that the guidance provided by this Court in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1991), regarding Eleventh Amendment immunity is applicable only to bistate entities?

2. In ruling on whether an entity created by a single State is entitled to Eleventh Amendment immunity, did the court of appeals err in determining to be irrelevant the absence of *any* evidence that money judgments against the entity would be payable from the State treasury?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LIST

Aside from the parties named in the caption, the following were Defendants/Appellees in the Court of Appeals: Jack Hightower, Lloyd Doggett, and Bob Gammage. They were named as defendants in the complaint, in their official capacities as justices of the Texas Supreme Court. They are no longer members of the Court, having been replaced, respectively, by Greg Abbott, Priscilla R. Owen, and James A. Baker.

Petitioner Washington Legal Foundation has no parent company or nonwholly owned subsidiaries to list pursuant to Supreme Court Rule 29.6.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioners Washington Legal Foundation (WLF), William R. Summers, and Michael J. Mazzone respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 12, 1996. Although this petition is being filed in a timely manner pursuant to Rule 13, Petitioners wish this petition to be considered a "conditional" cross-petition under Rule 12.5 in the sense that they

desire that it be granted *only* if the Court grants the petition in No. 96-1578, which seeks review of the same court of appeals judgment that is the subject of this petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 94 F.3d 996 and is reprinted in the appendix attached to the petition filed in No. 96-1578. Phillips Pet. App. 1a-19a. The opinion of the district court (Phillips Pet. App. 20a-40a) is reported at 873 F. Supp. 1. The order of the court of appeals denying Respondents' request for rehearing and suggestion for rehearing *en banc*, and the dissenting opinion from the denial of rehearing *en banc* (Phillips Pet. App. 41a-52a) is reported at 106 F.3d 640.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1996. A timely petition for rehearing was denied on February 14, 1997. Respondents' petition seeking review of the court of appeals's judgment (No. 96-1578) was docketed on April 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens, or Subjects of any foreign State.

Selected documents promulgated by the Texas Supreme Court and the Texas Equal Access to Justice Foundation are included in the Appendix to the Petition. App. 1a-6a.

STATEMENT OF THE CASE

This petition seeks a resolution to the conflict among decisions of the U.S. Courts of Appeals regarding the scope of the Eleventh Amendment to the United States Constitution. As construed by this Court, the Eleventh Amendment provides that "States" are immune from being sued in federal court unless Congress has properly abrogated that immunity. The issue that has divided the appeals courts concerns the definition of a "State" for Eleventh Amendment purposes.

Petitioners seek review of the Fifth Circuit's decision that Respondent Texas Equal Access to Justice Foundation (TEAJF) is an arm of the State of Texas and thus entitled to Eleventh Amendment immunity. The Fifth Circuit arrived at its decision based solely on its observation that "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." Phillips Pet. App. 18a.

Contrary to the approach adopted by most other courts of appeals, the Fifth Circuit did not address the issue of whether money judgments against TEAJF would be payable out of the treasury of the State of Texas. Indeed, the Fifth Circuit has held that this Court's recent decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) [which held that whether money judgments against a party would be payable out of a State treasury was "the most salient factor in Eleventh Amendment determinations" (115

S. Ct. at 404)], is inapplicable to cases involving entities established by a single State but rather is "a limited holding addressing the standard to be applied to *bistate* entities . . ." *Pillsbury Co. v. Port of Corpus Christi Authority,* 66 F.3d 103, 104 (5th Cir. 1995)(emphasis added), *cert. denied,* 116 S. Ct. 1705 (1996).

IOLTA in Texas. Petitioners' underlying lawsuit involves a constitutional challenge to the Texas IOLTA ("Interest on Lawyers' Trust Accounts") program. Under that program, funds belonging to certain individuals doing business in Texas are used -- without the consent and usually without the knowledge of those individuals -- to generate interest for a variety of legal services programs. Petitioners contend that the IOLTA program violates their rights under the First and Fifth Amendments.

The Texas ICLTA program was established by the Texas Supreme Court in 1984. By order effective May 9, 1984, the Supreme Court of Texas amended the State Bar Rules in order to create the Texas Equal Access to Justice Program (the "IOLTA program"). The amendments, codified as Article XI of the State Bar Rules, provided that an attorney receiving clients funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" was permitted to place the funds into an unsegregated interest-bearing bank account (an "IOLTA account") and to pay interest on those funds to a nonprofit corporation to be established by the Supreme Court of Texas. Article XI further provided that the nonprofit corporation was to be governed by a board of directors consisting of a chairman and twelve members. The chairman and six directors were to be appointed by the Texas Supreme Court and the other six directors were to be appointed by the president of the State Bar of Texas.

In order to implement Article XI, the Supreme Court of Texas by order dated April 30, 1984 adopted its "Rules Governing the Operation of the Texas Equal Access to Justice Program" (the "IOLTA Rules"). The IOLTA Rules provided, *inter alia,* that the nonprofit corporation whose creation was mandated by Article XI was to be the Texas Equal Access to Justice Foundation (TEAJF). The IOLTA Rules specified that funds forwarded to TEAJF from IOLTA accounts were to be awarded as grants solely to nonprofit organizations that "have as a primary purpose the delivery of legal services to low-income persons."

Articles of Incorporation for TEAJF were filed with the Office of the Secretary of State of Texas on January 11, 1985. Article Four of the Articles of Incorporation provides, *inter alia,* that TEAJF "shall have and exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas." Relevant portions of the most up-to-date versions of Article XI, the IOLTA Rules, and the Articles of Incorporation are reproduced in the Appendix. App. 1a-6a.

On December 13, 1988, the Texas Supreme Court amended Article XI and the IOLTA Rules in order to make participation in the IOLTA program mandatory. Phillips Pet. App. 3a-4a. Pursuant to the amended Article XI and the amended IOLTA Rules, attorneys in Texas who hold "client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" *must* place the funds in an unsegregated interest-bearing account, with interest earned thereon payable to TEAJF. *Id.* at 5a.

Proceedings Below. Petitioners filed suit on February 7, 1994, in U.S. District Court for the Western District of Texas, challenging the constitutionality of the Texas

IOLTA program. Named as defendants were: (1) TEAJF; (2) W. Frank Newton, in his official capacity as Chairman of TEAJF; and (3) the nine justices on the Texas Supreme Court, in their official capacities as justices (the "Justices"). Petitioners sought declaratory and injunctive relief against continuation of the IOLTA program, arguing that the program violated their Fifth Amendment rights by taking property without just compensation, and violated their First Amendment rights by forcing them to support ideological causes with which they disagree. Petitioners also sought a refund from TEAJF of all interest earned on their money placed into IOLTA trust accounts.

On December 4, 1994, Respondents TEAJF and Newton filed a motion for summary judgment, as did the Justices. Respondents argued that they were entitled to judgment as a matter of law on the First and Fifth Amendment issues, and also argued that they were immune from suit under the Eleventh Amendment and because they were not "persons" within the meaning of 42 U.S.C. § 1983. In response to the Eleventh Amendment argument, Petitioners cited this Court's *Hess* decision and asserted that TEAJF should not be considered an arm of the State of Texas in the absence of evidence that the Texas treasury would be liable for any money judgments entered against TEAJF.

On January 19, 1995, the district court granted Respondents' motions for summary judgment and denied petitioners' cross-motion for summary judgment. Phillips Pet. App. 20a-40a. Although the district court held that Respondents were entitled to judgment as a matter of law on the merits of Petitioners' constitutional claims, it nonetheless addressed Respondents' Eleventh Amendment arguments. The district court held that TEAJF was entitled to Eleventh Amendment immunity from suit because it was

an "arm" of the State of Texas. *Id.* at 38a. It made that determination without reference to *Hess* or Texas's potential liability for TEAJF's debts; rather, it held, "[A]n entity [*i.e.*, TEAJF] whose role is completely defined by the state supreme court, which acts as the agent of the court, occupies the position of a public agency for purposes of Eleventh Amendment analysis." *Id.*

Petitioners appealed to the Fifth Circuit. Petitioners again based their Eleventh Amendment argument on *Hess*, asserting that TEAJF is not part of the Texas state government.[1] Petitioners noted that TEAJF is established as a separate corporation under Texas law, and that Respondents had introduced no evidence that the Texas treasury would be liable for judgments entered against TEAJF.

On September 12, 1996, the court of appeals vacated in part and affirmed in part. *Id.* at 1a-19a. The court rejected the premise upon which the district court had dismissed Petitioners' constitutional claims -- that "clients do not have a valid property interest in the interest proceeds on funds in IOLTA accounts." *Id.* at 17a. Accordingly, the court vacated the award of summary judgment for Respondents and the denial of summary judgment for

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[1] Petitioners also argued that the Eleventh Amendment should not bar their claim for a refund of interest paid into the IOLTA program, for the additional reason that such a claim should not be considered a claim for "damages" for Eleventh Amendment purposes. Petitioners argued that courts have traditionally distinguished between damages claims and claims for equitable restitution (*see, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988)), and that the Eleventh Amendment should not bar the latter type of claims. Indeed, if the Eleventh Amendment were held to bar efforts to recover seized property, the Fifth Amendment's Takings Clause would be rendered a nullity with respect to uncompensated takings by a state government.

Petitioners, and remanded the case to the district court for further proceedings. *Id.* at 19a.

However, in an abbreviated section of its opinion, the appeals court affirmed with respect to Eleventh Amendment issues. The court held that Eleventh Amendment immunity extends to TEAJF because "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." *Id.* at 18a. The court did not cite *Hess*[2] and did not discuss whether any damages assessed against TEAJF could be payable from the Texas treasury.

On February 14, 1997, the Fifth Circuit denied Respondents' petitions for rehearing and suggestions for rehearing *en banc,* with six judges dissenting from the denial of rehearing *en banc.* *Id.* at 41a-52a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Conflict Among the Circuits Regarding How To Evaluate Claims that an Entity Is an "Arm of the State" Entitled to Eleventh Amendment Immunity

The Court last addressed the issue of how to evaluate claims that an entity is an "arm of the state" entitled to Eleventh Amendment immunity in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). Subsequent

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[2] That omission was unsurprising, given the Fifth Circuit's prior determination in *Pillsbury* that *Hess* is inapplicable to Eleventh Amendment immunity issues involving entities established by a single state.

court of appeals decisions have diverged wildly in their interpretations of *Hess*. The Fifth Circuit has taken the position that *Hess* applies only to bistate entities (entities created by compacts entered into between two states) and has no relevance to the Eleventh Amendment immunity of entities (such as TEAJF) created by a single state. *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1705 (1996). Thus, the Fifth Circuit did not even cite *Hess* in its evaluation of Respondents' Eleventh Amendment claims. Nor did its analysis take into account what *Hess* cited as "the most salient factor in Eleventh Amendment determinations" (*Hess*, 115 S. Ct. at 404): whether money judgments against the party seeking immunity would be payable out of a State treasury.

In direct conflict with the Fifth Circuit, at least four other courts of appeals have held explicitly that *Hess is* applicable to single-state entities and mandates that impact on State treasuries weigh heavily in deciding Eleventh Amendment issues. *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S. Ct. 340 (1995); *Gray v. Lewis*, 51 F.3d 426, 431-33 (4th Cir. 1995); *Sonnenfeld v. City and County of Denver*, 100 F.3d 744, 749 (10th Cir. 1996).

The Seventh Circuit, while acknowledging the applicability of *Hess* in the context of single-state entities, has held that whether money judgments would be payable out of a State treasury is a factor of lesser importance in the Eleventh Amendment analysis. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996)("effect on the state treasury" is a less important factor than: (1) the ex-

tent of state control over the entity in question; and (2) whether the entity acted as the State's "agent" in undertaking the challenged action). The Eighth Circuit appears to have taken a position somewhere in the middle. *Hadley v. North Arkansas Community Techn. College,* 76 F.3d 1437, 1443 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1080 (1997).

Virtually all of the appeals courts have expressed confusion regarding how *Hess* should be applied. *See, e.g., Mancuso,* 86 F.3d at 293 ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused"); *Gray,* 51 F.3d at 433; *Hadley,* 76 F.3d at 1443 (Lay, J., dissenting)("Today's decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities.").

New York's Attorney General echoed those concerns in asking the Court to review the Second Circuit's *Mancuso* decision. *See* Petition for Writ of Certiorari at 14-15, *New York State Thruway Authority v. Mancuso,* No. 96-381. Commentators have noted the absence of any coherent approach by the appeals courts to these types of Eleventh Amendment issues. *See* Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine,* 92 Colum. L. Rev. 1243 (1992). Additional guidance from the Court is urgently needed in order resolve the conflicts among the appeals courts.

A. The *Hess* Decision

The Court has consistently recognized that the Eleventh Amendment provides States with immunity from suit in the federal courts. The Court has also recognized, however,

that not every entity exercising state power qualifies for Eleventh Amendment immunity, which is reserved for entities that are "one of the United States." The Court has not, for example, extended immunity to political subdivisions such as counties and municipalities, even though such subdivisions are creatures of State government and derive their power from the States. *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977). In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Court listed several factors relevant in determining whether an entity created by a State was entitled to Eleventh Amendment immunity, including: (1) whether any judgment against the entity would be payable from the State treasury (*Lake Country*, 440 U.S. at 401); (2) whether the entity is "comparable to a county or municipality" (*id.*); (3) whether the entity's charter describes the entity as a "separate legal entity" (*id.*); (4) whether the entity's governing officials are appointed by state officials (*id.*); (5) whether funding for the entity is provided by the State (*id.* at 401-02); (6) whether the function performed by the entity is one traditionally performed by State governments or local governments (*id.* at 402); and (7) whether the entity's "authority to make rules within its jurisdiction is subject to veto at the State level." *Id.*

Not surprisingly, this multi-factor test for assessing Eleventh Amendment immunity resulted in widely disparate views, among the courts of appeals, on the scope of that immunity. The issue came before the Court again in *Hess* after the Second and Third Circuits reached opposite conclusions regarding the Eleventh Amendment immunity of Port Authority Trans-Hudson Corp. ("PATH"), a subsidiary of a bistate entity created as a result of a compact entered into between New York and New Jersey. Both the

majority and dissenting opinions recognized that the Court's prior decisions provided little guidance when the numerous indicators of immunity recited in *Lake Country* "point in different directions." *Hess,* 115 S. Ct. at 404; *id.* at 409 (O'Connor, J., dissenting).

In an effort to provided more precise guidance to lower courts, the Court explained that "the Eleventh Amendment's twin reasons for being remain our prime guide" on immunity issues. *Id.* at 404. It identified those "twin reasons for being" as: (1) "the States' fears that 'federal courts would force them to pay their Revolutionary war debts, leading to their financial ruin'"; and (2) a recognition that the States maintain certain attributes of sovereignty and thus are entitled to respect as members of the federation. *Id.* at 400 (internal citations omitted). The Court determined that, at least in the context of a bistate entity, denying immunity is not disrespectful of the States' status within our federal system, and thus that "the most salient factor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from State treasuries. *Id.* Finding no evidence that either New Jersey or New York would be forced to pay judgments against PATH, the Court ruled that PATH was not entitled to Eleventh Amendment immunity. *Id.* at 404-05.

The Court rejected PATH's (and the dissent's) suggestion that Eleventh Amendment immunity should turn on the degree of control wielded by a State over the entity in question. The Court noted that "ultimate control of every state-created entity resides with the State for the State may destroy or reshape any unit it creates" and yet the Court has never extended immunity to such state-created entities as cities and counties. *Id.* at 404. The Court also stated that basing immunity on the degree of "control" would "not

home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." *Id.*

While *Hess* provided considerable guidance to the appeals courts regarding arm-of-the-state immunity issues, it left many unanswered questions. Most fundamentally, it did not state definitively whether its approach was at all relevant to single-state entities such as TEAJF. The Fourth Circuit recently noted some of the other questions left unanswered by *Hess:*

> [*Hess*] did not offer any guidance as to how to apply any of the various factors in th[e] context [of a single-state entity], or for that matter in the multistate context. For example, . . . although the Court identified protection of state treasuries and respect for state sovereignty as the "prime guide[s]" when the various factors are in conflict, *id.* [at 404], it did not ascribe relative weights to these factors or explain the interrelationship of these two considerations. Finally, the Court explained neither when nor how the other "relevant considerations" factor into the central inquiry into the action's effect on the state's treasury and sovereignty.

Gray, 51 F.3d at 433.

B. Post-*Hess* Decisions in the Courts of Appeals

As noted previously, the Fifth Circuit -- both in this case and in other decisions -- has departed radically from the post-*Hess* approach of other appeals courts to Eleventh Amendment immunity issues. The Fifth Circuit has held flatly that the standards enunciated in *Hess* for evaluating

the Eleventh Amendment claims of state-created entities apply only to bistate entities such as PATH. *Pillsbury,* 66 F.3d at 104. In this case, the court ignored *Hess* and looked *only* to the degree of control exercised over TEAJF by the Texas Supreme Court in determining that TEAJF is an arm of the State of Texas. The court found determinative that TEAJF "acts on behalf of the Texas Supreme Court to carry out its role," a role "defined" by the Texas Supreme Court. Phillips Pet. App. 18a. The court did not consider Petitioners' claims that the State of Texas would not be liable for judgments entered against TEAJF; indeed, Respondents did not attempt to argue that the State of Texas *would* be liable.

Numerous post-*Hess* appeals court decisions directly conflict with the Fifth Circuit's approach. In *Mancuso,* for example, the Second Circuit held that the New York State Thruway Authority -- an entity established by New York State to operate a major public highway system -- was not entitled to Eleventh Amendment immunity, primarily because New York would not be liable for any judgments against the authority. *Mancuso,* 86 F.3d at 289. The Second Circuit denied immunity despite indicia of state control over the Authority that were far more numerous than those present here -- *e.g.*, all members of the Authority were appointed by New York's Governor, New York provided an initial appropriation to the Authority and guaranteed its initial bond offering, and the function served by the Authority (a state-wide highway system) is one that "a state would normally provide." *Id.* at 295. In contrast, only half of TEAJF's directors are appointed by the Texas Supreme Court, TEAJF has never received a penny in funding or guarantees from the Texas Supreme Court, and funding for legal services programs is not a function traditionally provided by state governments in particular.

(Indeed, the Texas legislature has repeatedly declined requests to provide funding to organizations providing legal assistance to indigents in civil proceedings.)

The decision below also directly conflicts with decisions of the Third Circuit, which relied primarily on the "State treasury" factor to deny Eleventh Amendment immunity to a state-created turnpike authority subject to considerable state control (*Christy*, 54 F.3d at 1145-46) and to a water and sewer authority. *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority,* 103 F.3d 1165 (3d Cir. 1997).

The decision below also directly conflicts with decisions of the Fourth Circuit, which relied primarily on the "State treasury" factor to vacate a grant of Eleventh Amendment immunity to a health department (*Gray,* 51 F.3d at 433-34) and to deny immunity to a sheriff's department. *Harter v. Vernon,* 101 F.3d 334 (4th Cir. 1996). *See also Doe v. Lawrence Livermore Nat. Laboratory,* 65 F.3d 771, 774 (9th Cir. 1995)(holding -- in a case involving a single-state entity -- that "State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state," without citing to *Hess*), *rev'd on other grounds sub nom., Regents of University of California v. Doe,* 117 S. Ct. 900 (1997).

In contrast, the Seventh Circuit largely agreed with the Fifth Circuit's approach in upholding the Eleventh Amendment immunity of the Wisconsin State Bar. The appeals court suggested that the force of *Hess* may have been undercut somewhat by the Court's more recent decision in *Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114 (1996). *Thiel,* 94 F.3d at 401. While acknowledging that *Hess* made clear that the "State treasury" factor is relevant

to Eleventh Amendment immunity issues involving both bi-state and single-state entities, the appeals court said that the "State treasury" factor is the *least* important of three factors to be considered. *Id.* The court stated that the two more important factors are the extent of "control" exercised by a State over the entity in question and whether the entity was acting as the State's "agent" when it took the disputed action. *Id.* Finding that the Wisconsin Supreme Court exercises significant day-to-day control over the activities of the Wisconsin State Bar and that the State Bar was acting as the Wisconsin Supreme Court's agent in enforcing rules promulgated by the court, *Thiel* held that the Wisconsin State Bar was entitled to Eleventh Amendment immunity -- regardless whether any judgments against the State Bar would be payable out of the State treasury. *Id.* at 402-03.

Review by this Court is warranted to resolve the sharply conflicting approaches employed by the courts of appeals in Eleventh Amendment arm-of-the-state cases. The Court needs to make clear whether *Hess*'s primary reliance on the "State treasury" factor has any application in cases involving single-state entities; and if so, how the "State treasury" factor is to be balanced against the other "twin reason for being" of the Eleventh Amendment identified by *Hess* (115 S. Ct. at 404): respect for state sovereignty.

II. The Decision Below Is Inconsistent with the Decisions of This Court

Review is warranted for the additional reason that the Fifth Circuit's decision is so plainly inconsistent with this Court's decisions. Even assuming that the *Hess* analysis is not strictly applicable to single-state entities, decisions issued both before and after *Hess* make clear that a State's liability for judgments entered against an entity is of at

least *some* relevance to the entity's Eleventh Amendment immunity. Accordingly, it was reversible error for the Fifth Circuit to grant immunity to TEAJF in the absence of *any* evidence that Texas would be liable for judgments against TEAJF and without even considering the relevance of the absence of such evidence. Moreover, even if one were to adopt the approach of the *Hess* dissenters and base the Eleventh Amendment determination on the extent of control exercised by Texas over TEAJF, the evidence is uncontradicted that the Texas Supreme Court exercises virtually no control over TEAJF's day-to-day activities. Accordingly, under virtually any conceivably applicable Eleventh Amendment standard, the court of appeals erred in bestowing Eleventh Amendment immunity to TEAJF.

The court of appeals's analysis was plainly inconsistent with *Hess*. In arriving at its conclusion that immunity was warranted, the court cited only three factors: (1) the Texas Supreme Court created TEAJF; (2) the Texas Supreme Court "defined" TEAJF's role; and (3) TEAJF "acts on behalf of the Texas Supreme Court" in carrying out that role. Phillips Pet. App. 18a. But those same three factors could be cited with respect to virtually *any* entity created by a State, and (as noted above) the Court has never granted blanket immunity to all state-created entities. The Port Authority of New York and New Jersey, for example, was created by New York and New Jersey to carry out a very specific role assigned to it by those States (to better coordinate "the terminal, transportation and other facilities of commerce in, about and through the port of New York"). Yet *Hess* rejected the notion that the Port Authority's status as a state-created entity with a specialized function was sufficient to render it immune from federal-court suit under the Eleventh Amendment.

Hess instead chose as the Court's "prime guide" the Eleventh Amendment's "twin reasons for being": concern for the State treasury and concern for state sovereignty. *Hess,* 115 S. Ct. at 394, 404. Even if one assumes that *Hess* is not strictly applicable to single-state entities, the Court made clear in a subsequent decision that a State's liability for judgments against a single-state entity is highly relevant in determining the entity's Eleventh Amendment immunity. *See Regents of University of California v. Doe,* 117 S. Ct. 900, 904 (1997)(enforceability against a State of a money judgment against a state instrumentality "is of considerable importance to *any* evaluation" of Eleventh Amendment immunity)(emphasis added). Accordingly, it was clear error for the Fifth Circuit not to consider TEAJF's failure to present evidence (and their failure even to argue) that Texas would be liable for any money judgment entered against TEAJF.

Indeed, all record evidence indicates that Texas would not be so liable. TEAJF is a separately incorporated entity authorized to "exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas." TEAJF Articles of Incorporation, Article Four; App. 5a. Such powers include the power "[t]o sue and be sued, complain and defend, in its corporate name"; "[t]o sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets"; and "[t]o make contracts and incur liabilities." Texas Non-Profit Corporation Act, Vernon's Tex. Stat. Ann. Corporations Code § 1396-2.02(2), (5), & (8). Texas has never provided any State funds to TEAJF, not even to assist with setting up the corporation. Rather, TEAJF has derived its revenues from interest earned on privately-owned IOLTA accounts. The IOLTA Rules explicitly contemplate that TEAJF's expenses are to be paid from its

interest income -- Rule 18 provides: "the Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs." App. 4a. There is no evidence that TEAJF has ever looked anywhere other than its own revenues for payment of its grants and expenses. In the absence of evidence that TEAJF has looked to Texas for payment of its expenses in the past, and given TEAJF's powers to enter into contracts, to incur debt, and to sue and be sued in its own name, there is no basis for concluding that the State of Texas would be liable for any money judgment entered against TEAJF in this case.

Nor is it any answer to assert that a judgment against TEAJF is, in effect, a judgment against the State in the sense that every dollar taken from TEAJF is one more dollar that Texas must expend to meet its social services obligations. *Hess* rejected just such an argument, reasoning:

> A charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder. But none would conclude, for example, that in times of flood or famine the American Red Cross, to the extent it works for the public, acquires the States' Eleventh Amendment immunity. The proper focus is not on the use of profits or surplus, but rather is on losses and debt. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" -- both legally and practically -- then the Eleventh Amendment's core concern is not implicated.

Hess, 115 S. Ct. at 406.

Nor does the second of the Eleventh Amendment's "twin reasons for being" (*id.* at 404) -- concern for state sovereignty -- favor a grant immunity to TEAJF. Because suit for injunctive relief against TEAJF's Chairman in his official capacity is permissible under *Ex parte Young*, 209 U.S. 123 (1908), the propriety of TEAJF's past conduct is already subject to federal-court scrutiny. Accordingly, there is at most a very minor affront to Texas's sovereignty when a state-created (but not closely controlled) corporation already subject to suit (through its Chairman) for injunctive relief finds itself subject to suit for money damages as well. That is particularly true when the "damages" claim consists solely of an effort by individuals to reclaim several hundred dollars in interest income alleged to have been seized from them by the corporation.

Moreover, the Fifth Circuit's decision was clearly wrong even if one accepts the views of the four *Hess* dissenters. Rather than focusing on the "State treasury" factor, the dissenters would have focused their Eleventh Amendment analysis on the extent to which the State government exercises "immediate control and oversight" over the State-created entity and "retains veto or approval power over an entity's undertakings." *Hess*, 115 S. Ct. at 411 (O'Connor, J., dissenting). The record evidence indicates that the Texas Supreme Court exercises very little "immediate control" over TEAJF. While the Texas Supreme Court has provided general guidelines to TEAJF regarding how grant funds are to be expended (App. 2a), it has never attempted to override TEAJF's decisions regarding which IOLTA grants are to be approved, or to approve or disapprove of TEAJF's annual budget. While Texas can exercise some degree of oversight over TEAJF's

activities by virtue of its power to appoint its directors, even there its control is somewhat limited since it gets to name only six of TEAJF's 12 directors, plus its chairman. The other six directors are named by the President of the State Bar of Texas. App. 2a.

In sum, the Fifth Circuit's analysis of Eleventh Amendment arm-of-the-state issues is plainly inconsistent with the recent pronouncements of this Court. That inconsistency provides an additional reason for reviewing the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM TEXAS STATE BAR RULES, ARTICLE XI: "INTEREST EARNED ON CLIENT FUNDS HELD BY ATTORNEYS"

SECTION 1. SHORT TITLE

This article may be referred to as the Texas Equal Access to Justice Program.

* * *

SECTION 3. RULES

This Court shall hereinafter promulgate rules, consistent with the provisions of this Article, that are necessary and appropriate to carry out the purposes of this Article and conform the program created as provided by this Article to applicable statutes, regulations, and rulings. The rules, which may be amended or revoked by this Court from time to time as it deems necessary to carry out this Article, shall provide for:

(A) The formation of a corporation, incorporated without members under the Texas Non-Profit Corporation Act (Tex.Rev.Civ.Stat.Ann. art. 1396-1.01 *et seq.*), to be the recipient of and disbursing agent for interest earned on client funds as provided by this Article;

* * *

SECTION 4. PROVISIONS RELATING TO THE NONPROFIT CORPORATION

(A) The nonprofit corporation provided for in this Article shall be organized in such a manner as to be exempt from federal income taxation under the Internal Revenue Code of 1954, or any subsequent internal revenue law.

(B) The exclusive purpose of the nonprofit corporation provided for in this Article shall be to grant funds received by it, as provided in this Article, to organizations that will use the funds exclusively to provide legal services to the indigent in civil matters.

(C) The nonprofit corporation provided for in this Article shall be governed by a board of directors consisting of a chairman and twelve members. The chairman and six directors shall be persons appointed by this Court and the other six directors shall be persons appointed by the president of the State Bar of Texas, with the approval of the board of directors of the State Bar of Texas. At least two of each group of appointees to the board of directors, other than the chairman, shall not be attorneys, and shall not have, other than as consumers, a financial interest in the practice of law.

* * *

(I) The nonprofit corporation provided for in this Article may expend funds for administrative costs of the program, including any costs incurred after the adoption of this Article, and may provide a reasonable reserve for administrative costs.

* * *

SECTION 8. LIABILITY OF NONPROFIT CORPORATION

If client funds that are neither nominal in amount nor on deposit for a short period of time are deposited under Section 5(A) of this Article, the liability of the nonprofit corporation provided in this Article may not exceed the amount of interest attributable to client funds actually paid by the depository to the nonprofit corporation.

SECTION 9. INITIAL DISTRIBUTION OF FUNDS

The initial distribution of funds under this Article shall be made at a time when, in the determination of the board of directors of the nonprofit corporation provided for in this Article, there are sufficient funds to provide an adequate distribution.

APPENDIX B

EXCERPTS FROM "RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE PROGRAM"

RULE 1. ESTABLISHMENT OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

The Texas Equal Access to Justice Program (the "Program"), Article XI of the State Bar Rules adopted and promulgated by the Supreme Court of Texas by Order dated April 30, 1984, shall be administered by the Texas Equal Access to Justice Foundation (the "Foundation"), a Texas Non-Profit Corporation.

* * *

RULE 18. ADMINISTRATIVE COSTS OF FOUNDATION

The Foundation may expend funds for administrative costs of the Program, including any costs incurred after April 30, 1984, and may provide a reasonable reserve for administrative costs.

* * *

RULE 20. INITIAL DISTRIBUTION OF FUNDS BY THE FOUNDATION

The initial distribution of funds under the Program shall be made at a time, when, in the determination of the Board of Directors of the Foundation, there are sufficient funds to provide an adequate distribution.

APPENDIX C

EXCERPTS FROM ARTICLES OF INCORPORATION OF TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

ARTICLE ONE NAME

The name of the corporation is the Texas Equal Access to Justice Foundation.

ARTICLE TWO NONPROFIT CORPORATION

The corporation is a nonprofit corporation.

ARTICLE THREE DURATION

The period of its duration is perpetual.

ARTICLE FOUR PURPOSE

The exclusive purpose for which the corporation is organized is to grant funds received by it to organizations that will use such funds exclusively to provide legal services to the indigent in civil matters.

The corporation shall have and exercise all rights and powers now or hereafter conferred on nonprofit corporations under the laws of Texas; provided, however, that the corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes of the corporation.

* * *

ARTICLE EIGHT ADDITIONAL PROVISIONS

* * *

(4) Upon dissolution of the corporation or the winding up of its affairs, the assets of the corporation shall be distributed exclusively to charitable, religious, scientific, literary, or educational organizations in this State which would then qualify under the provisions of Section 501(c)(3) of the Code and which at that time have a purpose similar to that of the corporation.